Statement of Walter Dellinger
before the Committee on Rules of the House of Representatives

Hearing to Address Mass Incapacitation of Members and the Quorum Requirement in the Context of the Continuity of Congress

Thursday, April 29, 2004, at 10 a.m.

Mr. Chairman, and members of the Committee, thank you for inviting me to appear today. My name is Walter Dellinger. I am the Douglas B. Maggs Professor of Law at Duke University; I am also a partner and head of the appellate litigation section of the law firm O'Melveny & Myers. The attacks against our nation on September 11, 2001, made clear the need to address structural vulnerabilities that could impair the functioning of the national government after a major terrorist attack or other catastrophe. I am glad that this committee, and the entire House of Representatives, have taken their responsibility to address these issues. I hope that my perspective as a professor who has studied the Constitution for over 30 years, and a lawyer who has advised past presidents and attorneys general on constitutional issues, will be of value as this committee continues its important work to ensure the continuity, effectiveness, legitimacy, and representativeness of the legislative branch in the aftermath of a major attack or disaster.

In preparing to testify today, I have studied the relevant constitutional provisions, court cases, and historical evidence on the Constitution's quorum requirement and the House's rulemaking power. I have also studied committee staff's drafts of proposals amending the quorum requirement in House Rule XX. Finally, I have reviewed other proposals aimed at ensuring continuity in government, such as the Continuity in Representation Act of 2004, H.R. 2844, and various proposals for constitutional amendments. I believe that an amendment to the House Rules' quorum requirement not only would be constitutional, but also will be a vital part of any solution to the continuity in government problem. I believe that the draft rule amendments I have seen go a long

way toward filling that role, but fall short in certain respects. More specifically, my conclusions, discussed in detail in the remainder of these remarks, are that:

- First, the Constitution would permit the House to adopt a rule providing that a majority of non-incapacitated members shall constitute a quorum to do business in the event of a major catastrophe imperiling the ability of the House to otherwise function. The time to adopt such a rule is now, in advance of any possible catastrophe, and when the rule will have the added legitimacy of having been debated by the entire House, and adopted in the clear absence of partisan motives. Whether such a rule change is a better solution than any particular constitutional amendment is a question I express no position on today. But at the very least, such a rule is advisable as a stopgap measure while possible constitutional amendments addressing the question are debated by Congress and by the States.
- Second, I do not believe that the propriety of such a rule change would be justiciable by the courts. Rather, lawsuits challenging such a rule will likely be dismissed by the courts as nonjusticiable for lack of litigant standing, for lack of ripeness, or because such cases would present a political question constitutionally entrusted to Congress itself rather than to the courts.
- Third, although the courts would have no role in judging such a rule, the Constitution imposes on the House a solemn duty to make sure that any rule change is not only capable of addressing the threats at issue, but also faithful to the principle of majority rule, congruent with the Framers' constitutional plan, and precise enough to prevent the manipulative use of the rule in situations for which it

was not intended. Because the goal of the rule change is to safeguard the House's ability to function as a representative body when external events have rendered the House otherwise unable to act, the rule must be broad enough to include incapacitating events that we might not now be able to forecast. But a rule aimed at safeguarding our country *in extremis* ought not to be drafted in a way that would permit its use by factions aiming for undemocratic results -- constitutional legitimacy demands that the rule be narrowly tailored in order to prevent abuses. The proposals I have seen so far, unfortunately, do not quite succeed on that count. As a result, I recommend that the Committee continue to work on drafting a rule change that would be consistent and not subject to partisan manipulation. More specifically, I recommend that such a rule (i) have a clear and precise definition of the extraordinary circumstances in which external events incapacitate large numbers of Representatives, triggering the rule's taking effect; (ii) take effect only upon bipartisan recognition of those triggering circumstances; and (iii) provide that the extraordinary quorum rules cease operation within a definite time period, unless the emergency circumstances are periodically recertified by that bipartisan authority.

I. THE CONSTITUTION PERMITS THE HOUSE TO ADDRESS THE QUORUM ISSUE BY RULE

The quorum requirement comes from Article I, § 5, cl. 1 of the Constitution, which provides that:

> Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and **a Majority of each shall constitute a Quorum to do Business**; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

The House's rulemaking power comes from clause two:

> Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

Some terms in the quorum clause are clearly not open to debate. When the Constitution requires a "majority," it seems clear enough that that means, as the dictionaries put it, "more than half." Other terms are more fluid and open to interpretation. The question is, who is counted towards the majority, and a majority of what number. To determine whether a given number of Representatives constitutes a "majority," we calculate a fraction, with a numerator and a denominator.

The rule establishing the "numerator" for the quorum determination has changed significantly over the years. For many years, the House did not count towards the quorum members present in the Chamber unless they answered to a roll call – a practice changed in 1890 by Speaker Reed, who directed the Clerk to enter on the record the names of Members present but not voting, and count them towards the quorum. This practice was formalized on February 14, 1890, when the House adopted a rule that:

> On the demand of any Member, or at the suggestion of the Speaker, the names of Members sufficient to make a quorum in the Hall of the House who do not vote shall be noted by the Clerk and recorded in the Journal, and reported to the Speaker with the names of the Members voting and be counted and announced in determining the presence of a quorum to do business.

That rule was upheld by the Supreme Court in the 1892 case *United States v. Ballin*, and today's House Rules persist in the practice.

The proposed rule considered today concerns the "denominator" in the quorum determination – what constitutes the House from which a majority must be present. Here, too, historical practice has varied. Between 1861 and 1891, the House had a practice of counting all Members chosen and living as the body from which a majority must be present. Later rulings revised the criteria so that a quorum would consist of a majority of Members who had been elected and sworn-in, and had neither died, nor resigned, nor been expelled. I believe that each of these methods of counting a quorum is constitutional, as would be the proposal to include in the denominator only Members who are not incapacitated, in the event of a serious catastrophe threatening Congress' functioning. In other words, the Constitution is flexible enough to permit a number of different formulas for determining a quorum – and the fact that Congress is empowered by the rulemaking clause to adopt a relatively strict version of the rule does not mean that it is prohibited from adopting a looser version.

This is not to say that there are no limits on the House's ability to define what constitutes a quorum. As noted before, the Constitution's use of the term "majority" is clear and unambiguous. No matter what the House chooses to make the numerator and denominator for the quorum inquiry, it is obvious that the House could not decide that some fraction less than 50% was a majority. Nor, I submit, could the House decide to exclude from the denominator properly sworn members entitled to vote who have chosen of their own free will not to attend. This is because the Constitution envisions a different

method of reconciling such Member non-cooperation with the House's need to do business: the Constitution empowers the non-majority of the House that is present to "compel" the absent Members' attendance – a power that would be unnecessary if the House could simply count those absent members towards the quorum's numerator or exclude them from the denominator. Similarly, it would be unconstitutional for the House to adopt a rule that eviscerated the quorum requirement by defining it out of existence. For instance, a rule that chose for the denominator the number of Members already present in the Chamber would be illegitimate. Such a rule would mean that there was always a quorum – making a mockery of the Framers' plan that there would be times when the failure of a quorum did indeed prevent the House from doing business.

But within these restrains, the Constitution should be read as conferring a fair amount of discretion on the House to determine from whom the quorum must be drawn. It would be fine for Congress to decide that a quorum consists of a majority of the statutorily-provided number of Representatives (currently 435). It would be equally legitimate for the House to exclude from the denominator those Representatives who are dead, those who have resigned, those who have been expelled, or, as we are discussing today, those who have been rendered temporarily or permanently unable to discharge their duties as a Representative. Article I, Section 5 simply is not so specific as to require or prohibit any one of these ways of defining the quorum.

There is another reason why the Constitution must be read as permitting this kind of rule change. The legislative powers that Article I vests in Congress would be absolutely critical for our nation to respond to the type of calamity that the rule change is

designed to address. It is Congress that has the constitutional power to "lay and collect Taxes," and spend and borrow money; to "define and punish Offenses against the Law of Nations"; to "raise and support Armies" and "provide and maintain" the Navy; to legislate regarding "the Militia"; to suspend the writ of habeas corpus when "in Cases of Rebellion or Invasion the public Safety may require it"; and, of course, to "declare War." Depending on the type and scope of the catastrophe at issue, the immediate exercise of some or all of these powers might be absolutely necessary to provide for the safety of the citizenry and for the very continuation of republican, constitutional government itself. It is simply inconceivable that a Constitution established to "provide for the common defense" and "promote the general Welfare" would leave the nation unable to act in precisely the moment of greatest peril. No constitutional amendment is required to enact the proposed rule change, because the Constitution as drafted permits the Congress to ensure the preservation of government.

The Constitution's framers recognized that it was just as important to empower the federal government to act properly as it was to prevent the government from acting improperly. As Alexander Hamilton put it in the Federalist Papers, "[t]he public business must in some way or other go forward." We must not forget "how much good may be prevented, and how much ill may be produced, by the power of hindering the doing what may be necessary, and of keeping affairs in the same unfavorable posture in which they may happen to stand at particular periods."

Allowing the Congress to simply cease functioning in the event of a major catastrophe would serve not a single structural interest of the Constitution. It would not

serve federalism interests, because even a Congress much smaller than that authorized by law would represent the nation's diverse geographic interests better than no Congress at all. It would not serve the separation of powers, because even a greatly diminished Congress would serve as a better check and balance on the executive branch than would no Congress at all. (Indeed, the existence of a functioning Congress might well prove critical to the very survival of the executive branch: in the event of an attack that harmed the President, Congress might be called upon under the Twenty-Fifth Amendment to determine who is to exercise the powers of the presidency if there is a dispute over the President's own capacity to discharge the powers and duties of his office.) Finally, a nonfunctioning Congress would not serve the cause of individual rights, because, in the absence of congressional authority, the country would presumably have to convert to some form of martial law–a kind of government especially unlikely to respect due process and individual rights. In short, whether or not a reduced quorum is desirable in normal circumstances, it is absolutely vital to the constitutional scheme when the alternative would be the total incapacitation of the Legislative Branch.

In fact, a functioning House is so critical in times of emergency that, one way or another, it would be necessary, if much of the House were incapacitated, for the remainder to find a way to continue to function. In the event of a major catastrophe, the House will have to find a way to fulfill its duties, whatever you decide today. One of the main points I wish to make is that if disaster does strike, a diminished House of Representatives would have far more legitimacy operating under an emergency quorum rule that had been decided in advance than it would operating under a quorum rule

devised *ad hoc* under emergency conditions. A rule adopted now will have the legitimacy of having been debated and approved by the full House, operating under traditional quorum rules -- it will therefore escape the bootstrapping problem that would occur if a diminished House tried to change the quorum rules. Moreover, a rule adopted now, in advance of any of emergency, would gain the legitimacy of having been adopted from behind what John Rawls called a "veil of ignorance." In other words, a rule adopted now will be perceived as neutral and fair, because it will have been adopted by a Congress that did not know which party, which faction, or which individual representatives would be empowered by the rule's eventual invocation. This will especially be the case if, as I suggest in Part III below, the rule adopted is clear and precise about the triggering mechanisms necessary for the Rule's invocation. That way, whoever is in the leadership when the rule is invoked will benefit from the legitimacy of having applied a clearly applicable law, rather than having made merely a debatable judgment call.

Certainly, changes to the quorum requirement could also be accomplished by constitutional amendment. Such an amendment either could address the quorum calculation directly, or could ensure the presence of a quorum by providing for temporary replacements of incapacitated members. There have been a variety of proposals for constitutional amendments, including one by the bipartisan Continuity of Government Commission, a joint project of the American Enterprise Institute and the Brookings Institution. Although I have studied some of these proposals, I do not think it is my place to comment on them here. What I can say is that the constitutional amendment process is

invariably slow, and that waiting for a constitutional amendment would leave us vulnerable to potential lapses in the continuity of government for too long a time. Even if the House believes that a constitutional amendment is the best way to solve the continuity in government problem, it makes sense to act now with a change to the House rules, to provide for the continuity of government until a constitutional amendment can be proposed and ratified.

II. CHANGES TO THE QUORUM RULE WOULD BE NONJUSTICIABLE.

When we say that a case is nonjusticiable, we mean that the federal courts are jurisdictionally foreclosed from hearing the case under Article III of the Constitution, either because the dispute is not the kind of "case" or "controversy" to which the judicial power extends (usually where the dispute is too abstract or hypothetical), or because the dispute involves the sort of "political" question that the Supreme Court has decided ought to be resolved by the legislative or executive branch. I believe that, if the House adopts a rule that changes the method of calculating a quorum when extraordinary circumstances render much of the House incapacitated, lawsuits challenging the constitutionality of the rule change would be dismissed for lack of jurisdiction.

There are two situations in which litigants might attempt to challenge the constitutionality of such a rule. First, some plaintiffs might attempt to sue after the rule's passage but before it has ever been invoked. Under current Supreme Court precedent, no plaintiff (including Members of Congress who might wish to sue) would be held to have legal standing to raise the issue in such circumstances. Until the rule is invoked to find a

quorum present where one would otherwise not exist, the propriety of the rule would be only an abstract issue ineligible for judicial decision. Later on, a court might be called upon to decide the constitutionality of the rule change if and when the new quorum rule was actually used to pass laws for which a quorum would otherwise have been absent, and a litigant affected by such a law argued that the law was not properly enacted. Even then, the rule would probably be held to present a nonjusticiable political question, and the case dismissed.

For a plaintiff to have standing to litigate, the Supreme Court has said, the plaintiff must have an "injury in fact" -- that is, "an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical."'" With only one exception not relevant here, the Supreme Court has held that a litigant has standing only to complain about an injury that is "particularized" as to that plaintiff, and affects him "in a personal and individual way." It should be obvious why I believe this requirement will not be satisfied by a plaintiff complaining about the mere passage of a rule amendment. The fact that Congress passes a rule change that would not take effect except in certain catastrophic and unlikely situations does not presently work a concrete harm to anybody's legally protected interests. The passing of such a rule change does not put anyone in jail, make anyone richer or poor, or inhibit the exercise of anyone's constitutional rights. A plaintiff cannot be granted standing merely to vindicate his abstract interest in the legality of congressional rules; a series of cases reject basing standing on such "*generalized* grievances" as citizens' shared interest that their government follow the law. And to the extent that there is any injury at all to a

particular plaintiff stemming from such a rule's passing, the injury is the very essence of "conjectural" or "hypothetical." Such a plaintiff would have to complain that he or she *would* be harmed *if* (i) a catastrophic triggering event occurred, *and* (ii) the House decided to invoke the reduced quorum rule, *and* (iii) the House then passed a bill which it would otherwise have been prevented from passing by lack of a quorum, *and* (iii) the bill was thereafter enacted into law (by concurrent Senate passage, *and* then either a presidential signature or a congressional override of presidential veto), *and* (iv) the bill substantively disadvantaged the plaintiff. An injury contingent on so many unlikely happenings is far too speculative to confer standing. At the very least, a court is likely to conclude that challenges to the rule change are not "ripe" until the rule has actually been invoked and used to pass laws.

A court is just as likely to dismiss a case challenging the rule change if the case is brought by a Member of the House complaining that the rule change infringed his or her prerogatives as a Representative. In *Raines v. Byrd*, the Supreme Court dismissed on standing grounds a lawsuit brought by Members of Congress challenging the constitutionality of the Line Item Veto Act. The Court noted that a prior case had upheld a congressman's standing to challenge his exclusion from the House of Representatives (and his consequent loss of salary). But, the court added, that case did not provide precedent for finding standing for legislators who were not "singled out for specially unfavorable treatment as opposed to other Members," and did not claim to be "deprived of something to which they *personally* are entitled." The Court in *Raines* also noted another previous case which had found standing for members of a state legislature who

alleged that their vote on a particular piece of legislation had been "completely nullified" by an allegedly improper procedure; there, the Court said, standing was justified because the legislators alleged that under a proper procedure, their votes "would have been sufficient to defeat . . . [that] specific legislative Act." None of the conditions that might justify legislative standing were present in *Raines*, and none are present here. No Member of Congress could claim that amendment of the quorum rules specifically disadvantaged him or her as against other members. (To the contrary, if the rule change is enacted in advance of any catastrophe, as I recommend, then all members are on an equal footing – not knowing whether they would be among those incapacitated by a future attack, or among those left to govern under the new rule.) Nor does the rule affect the personal prerogatives or property rights of particular members. Finally, the rule change will not nullify any Member's vote. (Any Representatives among the incapacitated would be physically incapable of casting a vote to be nullified in any case; those present and voting after a catastrophic disruption would have their votes counted just like anyone else's.)[1]

It is true that the U.S. Court of Appeals for the D.C. Circuit has occasionally granted Members of Congress and the public standing to challenge the internal operations of the House. In *Vander Jagt v. O'Neill*, for instance, the D.C. Circuit found that individual Members had standing to protest the allocation of committee seats between

[1] *Raines* did leave open the possibility that the House itself may have standing to litigate (or to authorize certain members to litigate) disputes threatening its institutional power. But since the House also has the ability simply to change any rule it finds offensive, it is unlikely to authorize a member to challenge on its behalf a rule that the House has adopted and refuses to change. Even if the House did attempt to authorize a member to litigate such a case on its behalf, the case would almost certainly be held nonjusticiable for lack of a truly adversarial relationship between the parties.

majority and minority parties; the Court in *Vander Jagt* held that the plaintiff-Members had stated a valid claim in alleging that the challenged practice had "diluted" their power and influence. A later case, *Michel v. Anderson,* further found standing for voters who had elected Members whose voting power had allegedly been diluted by a House rule permitting delegates from the District of Columbia, Puerto Rico, and various territories to vote in the Committee of the Whole. This line of authority does not change my analysis of the standing issue. To begin with, both *Vander Jagt* and *Michel* were decided before the Supreme Court's decision in *Raines v. Byrd.* In contrast, immediately after the *Raines* decision, the D.C. Circuit issued an opinion in *Skaggs v. Carle* denying standing to a group of Representatives and voters (as well as the League of Woman Voters) challenging a newly enacted House rule requiring a three-fifths majority for actions involving tax increases. *Skaggs* did not reject the "vote dilution" theory of *Vander Jagt* and *Michel.* To the contrary, *Skaggs* expressly reaffirmed it. But *Skaggs* nevertheless found a lack of standing on the ground that plaintiffs in the case has suffered no "imminent injury," since the rule in question could simply be suspended, waived, or modified by majority vote of the House at any time. Similar considerations ought conceivably to govern any challenge to the quorum rule changes that might be brought in the D.C. Circuit. Moreover, as part of its legislative standing analysis, the D.C. Circuit employs a doctrine of "remedial discretion," under which it generally elects not to provide a remedy that would enjoin a Congressional rule. Hence, even if the D.C. Circuit were to find standing to hear a challenge to the rule change, it would likely dismiss the case nevertheless as a matter of remedial discretion. This was, in fact, the outcome in

Vander Jagt and several of the other cases in that court finding standing to challenge congressional procedures.

Finally, I believe that, if catastrophic circumstances do come to pass and the reduced quorum rule is invoked to pass laws that would otherwise have failed, then certain individuals particularly affected by those laws could have standing to challenge them. Even then, however, such lawsuits would be subject to dismissal as nonjusticiable under the political question doctrine.

The classic statement of the political question doctrine is found in *Baker v. Carr:*

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Several of these considerations would be especially prominent in a case challenging laws passed under reduced quorum rules during a national emergency. Most particularly, a court in such circumstances would properly consider the need to avoid multifarious and contradictory pronouncements during a time of national emergency.

In addition, given the range of historical precedents on the quorum issue, and the fluidity of the terms at issue (as discussed above in Part I), a court applying the political question doctrine in this sort of suit is likely to find a lack of judicially manageable standards, and a textual commitment of the quorum determination to the House itself. *United States v. Ballin* made clear that the House's rulemaking power is not limitless.

But, as the Supreme Court showed in the 1993 case *Nixon v. United States*, which dismissed a challenge to a Senate rule permitting a Senate committee to take testimony during impeachment proceedings, the combination of a vague and judicially unmanageable constitutional standard, and a textual commitment of a question to Congress, militate strongly in favor of finding a political question.[2]

III. SUGGESTIONS FOR CHANGES TO THE QUORUM RULE

What considerations would I recommend that drafters of a rule change keep in mind, in order to maximize the legitimacy and effectiveness of the rule, and minimize the potential for misuse?

- The substantive condition that would trigger the rule must be stated generally enough that the rule can really safeguard continuity of government, yet specifically enough so as to prevent fractional misuse. The events of September 11, 2001, show that it is not necessarily in our capacity to predict precisely the type of damage our enemies might wish to inflict on us. Moreover, the need for continuity in government is not limited to the aftermath of terrorist attacks; it would be folly to draft a rule that applied only to terrorist attacks, and not, for instance, to natural disasters. At the same time, the triggering event cannot simply be the failure of the House to produce a quorum. As I have discussed above, the Constitution specifically envisions that the House will be without a quorum at

[2] The only doubt on this point is created by the Supreme Court's decisions in *Bush v. Gore* and *Bush v. Palm Beach County Canvassing Board*, where the Court was apparently untroubled by the Constitution's apparent commitment of electoral vote disputes to Congress. *See generally* Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 Colum. L. Rev. 237 (2002).

some times when Members refuse to appear; the method to deal with that is not by changing the quorum rule, but rather by using the power to compel the attendance of absent Members. The rule must distinguish true disasters imperiling the very existence of the government, from the sorts of concocted, rhetorically overblown "crises" based on policy disagreements that are recurrent features of our constitutional scheme. Similarly, the rule should be triggered not by the mere absence of members from the House Chamber, but rather by their inability to discharge the duties of their office because of intervening external events. A rule incorporating all these concerns need not be excessively complex or convoluted. The rule's condition precedent could simply read: **"In the event of an extraordinary catastrophe incapacitating a majority of members and preventing them from discharging their duties as Members of the House, . . ."**

- For the rule's invocation to have true legitimacy, there must also be some procedural guarantee that the rule is not being improperly invoked for factional reasons. Unlike the traditional rule, where the quorum calculation is based on strictly objective measures such as death, the reduced quorum rule for extraordinary circumstances would be based on less clear-cut circumstances, presenting a heightened danger of manipulation. This loss of objective standards may be necessary in order to deal with the special problem the rule is designed to address; but Congress should certainly take care to minimize the risk of manipulation. For that reason, I strongly recommend that the power to invoke the rule be placed not solely in the discretion of the Speaker, but rather require as well

the concurrence of one or more members of the minority party's leadership, from a list chosen ahead of time. This need not be viewed as an encroachment on the Speaker's or the majority party's authority. Rather, the rule might well be drafted to placed the ultimate decision on invoking the rule in the Speaker's discretion, requiring only that this discretionary authority be triggered by a prior certification from outside the Speaker's own party. Once again, the language providing for this could be quite simple: **"Upon certification by two of the five most senior Members of the House not from the Speaker's own party, that an extraordinary catastrophe has incapacitated a majority of Members and prevented them from discharging their duties as Members of the House (or upon certification of two of the five most senior and nonincapacitated Members not of the Speaker's party, if any of the five most senior are incapacitated), and upon the Speaker's subsequent determination that such circumstance poses a grave threat to the nation, the Speaker shall be empowered to declare that the following extraordinary quorum rules are in effect. . . ."** This is but one suggestion. There are a number of alternatives that would serve to insure that the special quorum rule was not invoked for political purposes, but was rather used only in cases of bipartisan agreement that truly extraordinary circumstances exist.

- To ensure that the unusual quorum rules remain in effect no longer than the extraordinary circumstance that gave rise to them, any declaration that the extraordinary quorum rules are in effect should be subject to an automatic sunset

provision, providing that the House will revert to its ordinary quorum rules unless the minority party recertifies that the extraordinary situation still obtains, and the Speaker chooses to reinvoke the special quorum rule. This, too, will minimize the risk of manipulation, since public scrutiny of successive recertifications would provide a valuable check against abuse of the reduced quorum rule.

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